In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 770

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI—EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court.[1] The action sought to set aside a report and order of the Interstate Commerce Commission[2] which had been entered pursuant to the

[1] 28 U.S.C. 2284, 2325.

[2] *American Barge Line Company, et al.* v. *Alabama Great Southern Railroad Company, et al.*, Docket No. 30744, 316 I.C.C. 759 (1962).

remand decree in *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411 (N.D. Ala.), affirmed *per curiam sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Co.,* 361 U.S. 353. The three-judge court dismissed the action on the merits, thus permitting the Commission's report and order to stand.[3]

Arrow was a challenge under the Interstate Commerce Act to a practice by which railroads allegedly charged higher rates for shipping grain out of a port when it had entered the port by barge (so-called "ex-barge grain") than when it had entered by rail (so-called "ex-rail grain"). The three-judge court in *Arrow* held "that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions [the share of a through rate received by a participating carrier] received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements." 176 F. Supp. 411, 419. The case was remanded to the Commission "to enter an order prescribing lawful, reasonable, and nondiscriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast in conformity with this opinion." *Id.* at 421.

In the present proceeding, following remand the Commission received evidence of the railroads' divisions of through all-rail rates. This evidence established that appellants' charges for shipping ex-barge

[3] The opinion of the court below is reported at 233 F. Supp. 381. See J.S. 16–29.

grain and grain products from certain river ports to inland destinations are significantly higher than the amounts they receive under the applicable divisions of the established through all-rail rates.[4] 316 I.C.C. 759. The Commission ruled that, in the absence of cost justifications, these differentials would, under *Arrow,* constitute discrimination against connecting water carriers and shippers in violation of Sections 3(4) and 2 of the Interstate Commerce Act, 49 U.S.C. 3(4), 2 (316 I.C.C. 772, 774). It found that appellants had not shown any cost-justification for the differentials.

The Commission's order (J.S. 34–35) directed elimination of discrimination where ex-barge rates exceed either the present rail rates or the lowest divisions received by the railroads on joint all-rail rates for the same transportation. The three-judge district court unanimously affirmed the Commission's report and order.

ARGUMENT

The Commission's order, unanimously affirmed by the district court, complies with the direction of the *Arrow* decision to eliminate discrimination in the pricing of railroad services so as to preserve to water carriers and shippers using water carriers the inherent advantages of such transportation.[5] Appellants do not

[4] For example, to destinations to which the ex-barge rate from New Orleans is 35 cents, appellant The Texas and Pacific Railway Company's divisions of the through all-rail rates are 13.3, 17.8, and 19.8 cents, dependent on the commodity and point of origin (see 316 I.C.C. 759, at 766–77).

[5] The cases relied upon by the Commission and the district court as establishing discrimination here are *Interstate Com-*

deny that such discrimination exists here if their rate differentials are not cost justified. The objections which appellants do raise to the Commission's order are insubstantial and this appeal therefore presents no question warranting plenary consideration by this Court.

1. Appellants contend primarily that Section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)) precludes the Commission from entering an order prohibiting discrimination against barge traffic carrying bulk shipments of grain and grain products. This argument is based upon the facts that Section 3(4) proscribes rate discrimination only against "connecting lines," and that the term "connecting line" is defined as including "any common carrier by water subject to part III." Noting that water carriers carrying bulk quantities of grain and grain products are exempt from economic regulation under Part III of the Act by Section 303 (b), (c) (49 U.S.C. 903 (b), (c)), appellants argue (J.S. 5–6, 11) that the Commission was therefore wrong in this case to find discrimination against "exempt" barge traffic carrying bulk grain.

Appellants' argument ignores the fact that, insofar as the Commission's order finds discrimination against *barge carriers*, it explicitly finds it only "against connecting common carriers by water subject to Part

---

merce Commission v. *Mechling*, 330 U.S. 567; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y.), affirmed *per curiam*, 342 U.S. 951; and *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala.), affirmed *per curiam*, 361 U.S. 353.

III" (J.S. 34). Thus the Commission's order fully respects any limitations contained in Section 3(4). It is true that the Commission's order goes further and finds discrimination "against shippers whose grain and grain products reach those ports by for-hire barge transportation * * *" regardless of whether such barge transportation is subject to Part III of the Act (J.S. 34–35). This aspect of the order, however, flows not from Section 3(4) of the Act but from Section 2 (49 U.S.C. 2) which prohibits appellants from discriminating between *shippers* while performing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *." If shipper discrimination existed, Section 2 therefore justified an order prohibiting the discrimination even where the barges used were not subject to Part III of the Act.

2. Appellants' argument that the finding of the Commission of a Section 2 violation is not supported by substantial evidence ignores the holding of the court below that "[a] reading of the record before the Commission leads to the conclusion that the findings are supported by the record" and that "[t]here is a rational basis for the Commission's conclusion" (J.S. 28). The fact that no additional shipper testimony was adduced by the Commission following the remand in the *Arrow* case is immaterial. At various stages of this lengthy proceeding, representatives of shipper interests intervened and produced evidence concerning the impact of the grain rate structure upon

shippers and consumers.' This evidence, adduced in the same docket, was available to the Commission when it made its findings in the present phase of the case. In any event, shipper testimony was not needed to conclude that discrimination resulted under *Arrow* when railroads received from shippers similarly situated substantially different charges for the same transportation services.

3. Nor is there merit in appellants' argument that the use of divisions of joint all-rail rates as the measurement of discrimination against ex-barge grain would result in a denial of due process to the railroads and amount to an unconstitutional application of the Interstate Commerce Act (see J.S. 3, 8–9, 11). As the Commission made clear (316 I.C.C. at 773), its order does not prescribe the method of removing the discrimination found to exist. The railroads are free to establish rates at a compensatory level so long as the compensation actually received for the outbound rail movement of ex-barge grain is, at least in the absence of cost differences, no more than that received for the same movement of ex-rail grain. In sustaining the Commission's conclusion, the court below emphasized the freedom of the railroads to set their divisions or the rates charged on ex-barge and ex-rail shipments at a compensatory, non-discriminatory level (J.S. 25, 26).

---

[1] Part of the history of this case, dating back to January 4, 1951, when a number of barge lines and representatives of shipper and consumer interests filed a complaint attacking the grain rate structure at certain Mississippi and Tennessee river ports, is described in the *Arrow* case, *supra*. See also *Atchison, T. & S.F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kans.).

The other aspect of this argument that the Commission has set rates at a non-compensatory level is based upon appellants' contention, rejected by both the Commission and the court below, that there are substantial additional cost factors in handling ex-barge grain not present in the case of ex-rail grain (see, *e.g.*, J.S. 9–10, 11). The Commission's factual determination (316 I.C.C. at 773) that the railroads "have not overcome by their [cost] evidence the *prima facie* case of discrimination * * *" was specifically affirmed by the court below, which noted that the railroads' evidence on cost differences was entirely speculative (J.S. 27–28).

CONCLUSION

No substantial question warranting plenary consideration is presented and the judgment below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
DONALD L. HARDISON,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission.

FEBRUARY 1965.